



IT IS ORDERED as set forth below:

Date: October 03, 2011

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

IN RE:	:	CHAPTER 7
	:	
CHARLES PAUL WALKER,	:	CASE NO. 10-43491-MGD
	:	
Debtor,	:	JUDGE DIEHL
	:	
ED STATEN,	:	ADVERSARY PROCEEDING
	:	
Plaintiff,	:	CASE NO. 11-4004-MGD
	:	
v.	:	
	:	
CHARLES PAUL WALKER,	:	
	:	
Defendant.	:	

ORDER GRANTING IN PART PLAINTIFF'S MOTION TO QUASH SUBPOENAS

This matter is before the Court because Defendant seeks to depose Plaintiff and two other individuals and require the production of documents at the deposition. Plaintiff has moved to quash

Defendant's subpoenas because discovery has closed. On September 6, 2011, Defendant served subpoenas on Plaintiff, his wife Judy Staten, and Bill Sweeney. The subpoena also seeks the production of documents relating to Plaintiff's payment of a judgment by GMAC. Plaintiff's Motion to Quash Subpoenas ("Motion") was filed on September 9, 2011. (Docket No. 30). Defendant has filed a Response to Plaintiff's Motion and Plaintiff has filed a Reply to Defendant's Response. (Docket Nos. 31, 33).

Plaintiff commenced this case on January 31, 2011 by filing a complaint objecting to the dischargeability of debt under 11 U.S.C. § 523 and objecting to Defendant's discharge under 11 U.S.C. § 727. Defendant filed an answer on March 29, 2011, and discovery closed on June 27, 2011. (Docket Nos. 10, 13). Ten days before discovery closed, Plaintiff sought an extension of discovery. Defendant opposed the extension, and the Court agreed with Defendant that discovery should not be extended because Plaintiff had failed to prosecute discovery in the allowed time period. (Docket No. 13).

Defendant now seeks to take depositions after discovery has closed. Although discovery has closed, Defendant asserts that he seeks to take depositions for the preservation of evidence and not for discovery purposes. Aside from Rule 27, which is not applicable here, the Federal Rules do not explicitly distinguish between depositions in discovery ("discovery depositions") and depositions for the preservation of evidence at trial ("trial depositions").¹ *Estenfelder v. Gates Corp.*, 199 F.R.D.

¹ The distinction between discovery depositions and trial depositions has long been recognized in practice. *Estenfelder*, 199 F.R.D. at 354. The distinction seems to arise from prior Rule 26(a), which governed depositions and preceded current Rule 30(a). *United States v. Int'l Bus. Mach. Corp.*, 90 F.R.D. 377, 381, n. 7 (S.D.N.Y. 1981). Prior Rule 26(a) provided that depositions could be taken "for the purpose of discovery or for use as evidence in the action or for both purposes." *Id.* This language was omitted in the 1970 revision of the Rules. *Id.*

351, 353 (D. Colo. 2001). While courts have noted no distinction between discovery depositions and trial depositions for purposes of admissibility at trial, courts have noted a difference between them for purposes of practicality. *Id.* at 354. Generally, trial depositions are not permitted after discovery has closed unless necessary to preserve the testimony of a witness who is unavailable for trial. *Charles v. F.W. Wade*, 665 F.2d 661, 664 (5th Cir. 1982). Trial depositions may be allowed when the deponent is unavailable because, for example, the deponent is outside the subpoena power of the court or the deponent is ill or elderly. *E.g., Id.; contra Integra Life Sciences I, Ltd. v. Merck KgaA*, 190 F.R.D. 556 (S.D. Cal. 1999) (disallowing trial deposition because party made tactical decision to not depose witness unavailable for trial during discovery).

Here, Defendant does not allege that the proposed deponents will be unavailable for trial. Indeed, one of the proposed deponents is the Plaintiff. Nor is there any evidence or reason in the record to suggest that the proposed deponents will be unavailable for trial. More important, the record reflects that Defendant made no attempt to depose the proposed deponents or acquire the documents and records requested in the subpoena during the discovery period. And when Plaintiff moved to extend the discovery period, Defendant opposed Plaintiff's motion because Plaintiff had similarly failed to prosecute discovery. The Court agreed with Defendant and denied Plaintiff's motion to extend the discovery period.

Defendant cannot now seek to depose Plaintiff and non-parties when Defendant did not attempt to depose them during discovery and has not shown that the parties are unavailable for trial. And Defendant cannot now seek to have Plaintiff and non-parties produce records or documents that should have been produced in accordance with a timely request for production of documents during the discovery period. For these reasons, the Court grants Plaintiff's Motion to Quash Subpoenas.

The Court pauses to note that, at a hearing on September 28, 2011, this adversary proceeding was consolidated by agreement of the parties with adversary proceeding case no. 11-04005, *Peeples, et al. v. Walker*. Accordingly, if any depositions are taken in the *Peeples, et al. v. Walker* adversary proceeding after September 28, 2011, then Defendant Walker must be permitted to participate in those depositions.

Finally, the Court turns to two similar requests made by Plaintiff and Defendant. Plaintiff request that sanctions be imposed on Defendant under Federal Rule of Procedure 45(c)(1), applicable to this Court through Federal Rule of Bankruptcy Procedure 9016. Rule 45(c)(1) provides for the court to enforce, through sanctions such as attorneys' fees, a party's duty "to take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." In his response to Plaintiff's Motion to Quash, Defendant requests that he be reimbursed for the time and costs involved in responding to Plaintiff's motion. Both Plaintiff's and Defendant's requests are denied, subject to the direction provided below.

Accordingly, it is

ORDERED that Plaintiff's Motion to Quash Subpoena is **GRANTED IN PART**. The proposed deponents are neither required to attend a deposition nor produce the requested documents. It is further

ORDERED that Plaintiff's Motion to Quash Subpoena is **DENIED** in so far as Plaintiff requests sanctions be imposed on Defendant. Defendant's request for reimbursement of time and costs is also **DENIED**. The denial of each request is subject to the following: If either Plaintiff or Defendant seeks to continue such request, then Plaintiff or Defendant may file a brief setting forth legal authority - including relevant case law - for granting the request. The brief must be filed within

fourteen days of the date of this Order. If no brief is filed by Plaintiff, then Plaintiff's request will stand as **DENIED**. If no brief is filed by Defendant, then Defendant's request will stand as **DENIED**.

The Clerk shall serve a copy of this Order upon Plaintiff, counsel for Plaintiff, and Defendant.

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